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UNITED STATES OF AMERICA

IN THE

Supreme Court of the United States

LOUISE METZINGER,
Plaintiff and Appellee,

vs.

JOSEPH METZINGER,
Defendant and Appellant.

ON PETITION FOR ALLOWANCE OF APPEAL, AND FOR WRIT OF CERTIORARI, TO THE UNITED STATES SUPREME COURT

BRIEF OF AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

The Amicus Curiae appears by virtue of his office and department, which he heads, being a political subdivision of the State of Michigan, and permitted to file a brief, as such, under United States Supreme Court Rule 27, Paragraph 9, coupled with written consent of attorneys for appellant and appellee.

The certified record contains the brief of the appellee and Friend of the Court for the Michigan Supreme Court, with informal statement and additional brief of the Friend of the Court. The challenged statute (R. 248) has been in full force and effect since 1919, except for amendment passed in 1939. The challenged court rules (R. 250) have been in full force and effect for the past twenty years.

INTEREST OF AMICUS CURIAE AND SOCIOLOGICAL HISTORY BEFORE AND AFTER EFFECTIVE DATE OF FRIEND OF THE COURT STATUTE

By reason of growth of states in population and commerce, courts, state and federal, likewise must keep pace with progress, which necessitates statutory regulations and adoption of new court rules. Michigan has been no exception. The Friend of the Court brief (B. 4), shows the increase in divorce bills filed and decrees entered commensurate with increase in population and business.

To meet changing economic conditions, public interest demanded some form of administrative service attachable to courts having jurisdiction in domestic relations matters.

Wayne County, which is the Third Judicial Circuit of the State of Michigan had a Domestic Relations Court created by statute in 1913 and, in Quo Warranto proceedings, the Supreme Court held the Act to be invalid. *Attorney General v. Lacy,* 180 Mich. 329.

It becomes apparent that public opinion began to assert itself relative to increased judicial facilities over thirty-two years ago.

The decision which held the Court Act invalid seems to have indicated that if a new Court was not obtainable, nevertheless the problem still remained that some form of relief must be found to aid the court in the ever increasing domestic relations litigation, having specially in mind that there always is a certain percentage of men who refuse to comply with court orders providing for the payment of allowance for minor children and alimony for the support of wives and also a certain percentage of custodians of children, either parent or relative, who are unsuitable, as well as immoral, all of which is highly detrimental to the dependents.

FIRST APPOINTMENT OF FRIEND OF THE COURT

The Third Judicial Circuit for the County of Wayne recognized the need for administrative assistance in domes-

tic relations litigation, caused an order to be entered in the Wayne County Circuit Court on January 7th, 1918, reading as follows:

> "It is ordered that Edward Pokorny be and he hereby is appointed Friend of the Court for the enforcement of its orders and decrees."

STATUTE CREATING OFFICE OF FRIEND OF THE COURT

This order was local in nature and within the confines of the County of Wayne. The State of Michigan, through its Legislature, recognizing the need of administrative assistance for all judicial circuits of the State, passed Act 112, Public Acts of 1919 (Brief for Appellant 248), which was later amended as above indicated.

In the State of Michigan there is a statutory integrated bar, whose membership is approximately 7,000. In the County of Wayne there are approximately 3800 dues paying attorneys.

In 1944, in the County of Wayne, were filed 15,055 divorce bills and for the same period 9,196 divorce decrees were entered. (Supplemental brief and informal statement 5.)

It is, therefore, obvious that domestic relations litigation is a large part of the business of many of the lawyers practicing in Wayne County.

The attorneys for the appellant are the only attorneys who have, since 1918, challenged the validity of Michigan Statute and Court Rules.

In 1942, Attorney Royal D. Rood filed in the Michigan Supreme Court, in the case of Frederick Teeters, petitioner, vs. eighteen Wayne County Circuit Judges, Edward Pokorny, Friend of the Court, and Emily Teeters, Respondents, No. 4208½, petition for Writs of Prohibition and Mandamus, seeking to restrain the court from continuing the functions of the Office of the Friend of the Court. The petition was denied.

The same attorney again challenged the acts of the Friend of the Court, in the Wayne County Circuit Court,

in the case of *Charles Warren McRae v. Marjorie Hart McRae*, No. 306,118, which was a petition for modification of decree relative to custody of a minor child. Again the court ruled that the objection was without merit.

The brief of the Friend of the Court (B. 6) shows a table of number of motions to modify temporary and permanent custody, alimony and allowance orders, from 1926 to 1943, totaling 19,175.

The Local Court Rule (Brief for Appellant 250), requires that all praecipes noticing motions in divorce, separate maintenance and marriage annulment cases shall be filed with the Friend of the Court, appointed deputy County Clerk for that purpose. The rule further provides that all praeciped motions shall be referred to the Friend of the Court for investigation and recommendation before being passed on by the court, and the attorney has the right to object to the recommendation of the Friend of the Court. Due notice of date of hearing is given to the attorneys, who appear before the judge hearing the motion and argue the merits of the motion and substance of the objections to the recommendation of the Friend of the Court.

At this point it is interesting to note that one or both attorneys may request of the court the right to take testimony. It is discretionary with the court in granting the request. See *Tuthill v. Tuthill*, 259 Mich. 272. (Appellee's brief in State Court, p. 7). It is needless to say that there are motions in the nature of petitions seeking various kinds of relief in domestic relations litigation where the subject matter was of such importance that the Court would hear the testimony of witnesses.

There would have been no need of appealing to the Supreme Court of the State of Michigan and now to the United States Supreme Court if the attorneys for the appellant had followed the simple request by way of statute and court rules for client to appear in the Office of the Friend of the Court before an investigator, assistant or

Friend of the Court, and make a statement or submit testimony and, after the conclusion of the hearing, the Friend of the Court would file a written report, containing a summary of the testimony and a recommendation for the court's findings. Copies of such report being mailed to the attorneys, who have the right to file objections. Upon a hearing before the court on the objections, the court has the discretionary power to take further testimony or do any other act in the administration of justice. To this simple administrative procedure the attorneys for the appellant object. A 250-page brief was filed with the Michigan Supreme Court and a 107-page jurisdictional statement and brief was filed in the United States Supreme Court, most of which misconstrues the purpose of the Friend of the Court Act and is immaterial and extraneous on the points at issue.

QUESTIONS PRESENTED

Whether Third Compiled Laws 1929, Sec. 12783 et seq., as amended, contravenes Article XIII, Sec. 1 and Article XIV, Sec. 1, United States Constitution.

NO FEDERAL QUESTION INVOLVED

Article XIII, Constitution of the United States, reads as follows:

> Sec. 1—"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction."

It is my understanding that appellant claims that refusal of the court to hear his petition for custody of minor son deprives the appellant of the services of his son, and

continuing in the custody of his mother is tantamount to involuntary servitude. The matter of custodyship of children in divorce cases is governed by the Michigan Statute, Section 12738 and Section 12739, Comp. Laws of 1929, continue jurisdiction in the court, said statute reads as follows:

> Sec. 17—"The court may, from time to time afterwards on the petition of either parent, revise and alter such decree concerning the care, custody and maintenance of the children, or any of them, and make a new decree concerning the same, as the circumstances of the parents, and the benefit of the children, shall require."

This statute was interpreted in the following cases:

> *Griffin v. Griffin*, 154 Mich. 536.
> *Meyers v. Meyers*, 161 Mich. 487.
> *Stone v. Stone*, 161 Mich. 565.

The pertinent parts of Section 1, Article XIV are as follows:

> "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

A review of the statute and court rules and the opinion of the Michigan Supreme Court does not in any way deprive the appellant of life, liberty or property. What has happened to him is in accordance WITH DUE PROCESS OF LAW.

THE LAW

The following federal cases indicate that no federal question is involved on appeal or certiorari when the issue deals with state statutes or practice and procedure in matters local or peculiar to the state.

CASES HOLDING APPOINTMENT OF DOMESTIC RELATIONS COMMISSIONER (ANALOGOUS TO FRIEND OF THE COURT) WITHIN AUTHORITY OF COURT

The question of the authority of the court to appoint a domestic relations commissioner by court rule was raised in the case of *Bussius v. Bussius,* 38 F. Supp. 871. The opinion was written by Associate Justice Morris and holds valid the authority of the court to appoint a domestic relations commissioner. The following captions summarize the opinion:

"1. Courts

United States Commissioners

"Federal District Court for District of Columbia has authority to appoint domestic relations commissioner with duty of making a pre-trial effort, in cases involving question of temporary custody of child or of amount of temporary maintenance, to eliminate questions on which there is no necessity of taking evidence, without precluding any party from having question determined by court upon sworn evidence when such party wishes to offer such evidence or to cross-examine witnesses offered by adverse party. Rules of District Court of the United States for District of Columbia, rule 15 (9); Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c.

"2. Divorce

"The federal government is an interested party in an action in the District of Columbia wherein dissolution of marriage relation is involved, and therefore the courts are bound to protect the public interest as well as the rights of the parties themselves.

"3. Divorce

"In divorce action where award of custody of child is involved, it is the peculiar responsibility of court to act in the best interests of the child even where the contentions of the parties might be adverse to that interest.

"4. Courts

"The procedure of federal district court in divorce action involving question of temporary custody of child or question of temporary maintenance in appointing domestic relations commissioner with duty of making pretrial effort to eliminate questions on which there is no necessity of taking evidence without in any way precluding any party from having question determined by court upon sworn evidence, when such party wishes to offer such proof or to cross-examine witnesses offered by adverse party, is not in derogation of rights of parties litigant.

"5. Courts

"In divorce action where federal district court appointed domestic relations commissioner with authority to make pre-trial effort to eliminate questions on which there was no necessity of taking evidence, plaintiff's objections to certain parts of the commissioner's report showed desire of plaintiff to have matters objected to determined by court upon evidence of sworn witnesses who were subject to cross-examination and therefore motion to strike such portions of the report was granted."

The question of the authority of the domestic relations commissioner was again raised in the case of *Brown v. Brown*, 134 F. 2d 505, which opinion was written by Associate Justice Rutledge, from which opinion the following captions summarize the opinion:

"1. Courts

"The purpose of the District Court rule providing for a domestic relations commissioner with authority to investigate cases involving determination of question of temporary maintenance for wife or child and to make report and recommendation in such matters is not to deprive party of opportunity to present such evidence as he wishes to offer in the usual manner and the rule does not make the report evidence or admissible in evidence. Rules of District Court of the United States for the District of Columbia, rule 15 (9); D. C. Code 1940, S. 11-312.

"2. Courts

"District Court rule providing for domestic relations commissioner with authority to investigate cases involving determination of question of temporary custody of child or question of amount of temporary maintenance for a wife or child and providing that when no objections are filed to report, court shall have authority to act on report without hearing, provides a convenient method by which facts may be secured and presented in interlocutory matters when both parties consent to its use, and rule is not invalid or beyond court's power to adopt. Rules of District Court of the United States for the District of Columbia, Rule 15 (9); D. C. Code 1940, S. 11-312.

"3. Courts

"Where under District Court rule providing for domestic relations commissioner with authority to investigate cases involving determination of question of temporary custody of child, father who had instituted suit for custody of child had full power to prevent application of rule to him by objecting to commissioner's report, the father was not entitled to an order that his motion for amendment of pendente lite custody order be not referred to the commissioner for investigation and report. Rules of

District Court of the United States for the District of Columbia, Rule 15 (9); D. C. Code 1940, S. 11-312.

"4. Parent and child

"When parents are at odds and their differences include custody of minor child, the court is an 'interested party' since the court representing the state is guardian of interest and welfare of child.

"5. Parent and child

"In proceeding between parents involving custody of minor children, all rights of the parents must be observed but the interest and welfare of the children are the primary considerations."

CASE HOLDING NO DENIAL OF DUE PROCESS OF LAW

As to due process of law in *James K. Brown v. State of New Jersey*, 175 U. S. 172, the court said

"The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. Citing cases—'The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its modes of judicial proceedings.'"

CASES HOLDING RIGHT OF STATE COURTS TO CONSTRUE OWN STATUTES

As to stockholder's liability under a state statute in *William Flash et al v. Adna C. Conn*, 109 U. S. 371, the Court said:

> "We think this is a case where the construction of a state court is entitled to great if not conclusive weight with us. It is the settled construction of a law of the state upon which the rights and liabilities of a large number of its citizens must depend."

As to Supreme Court of the State construing its own statutes in the *Board of County Commissioners of the County of Leavenworth v. Robert A. Barnes*, 94 U. S. 70, the court said:

> "The recent decision of the Supreme Court of Kansas, in a suit against this same county, and upon this same identical statute, relieves us from all embarrassment upon this question. It is a decision of the Supreme Court of that State giving effect and construction to one of its own statutes, and, according to well settled rules, will be followed by this court."

Construing a statute of Massachusetts in *Alexander C. Bowditch v. City of Boston*, 101 U. S. Supreme Ct. 16, the court said:

> "All the questions arising in this case are questions of local law. It is our duty to consider the controversy as if it were a court of the state and sitting there to apply her jurisprudence. The subject was within her police power and it was competent for her to legislate upon it as she might deem proper. It is wholly beyond the sphere of federal authority."

As to reviewing a decision of local practice, *Sanford et al v. Santiago Ainsa*, 228 U. S. 705, the court said:

"But we rarely disturb local decisions on questions of local practice, and we see no reason to do so in this instance."

As to State Court's construction of state statute and order thereunder, as controlling, in *Hotel and Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board*, 315 U. S. 437, the court said:

"In determining the validity of a state statute and of administrative order thereunder, the Supreme Court of the United States is controlled by the construction placed by the highest court of the State upon the statute and order."

SYLLABUS INTERPRETATION OF CASE (SUBJECT OF APPEAL) AS TO AUTHORITY OF COURT TO MODIFY DECREE AND PROCEDURE

Law decided by Court below in its opinion (which is the subject of appeal). *Metzinger v. Metzinger*, 310 Mich. 335.

"Jurisdiction—Support of Children

"Where original decree of divorce expressly provided that care and maintenance of the minor child of the parties was to be as therein set forth until the further order of the court, it retained continuing jurisdiction of such matter, hence where court entered order increasing allowance for child's support after holding a hearing on plaintiff mother's petition of which defendant father had due notice, and which related to support of the child, defendant father was not denied due process.

"Res Judicata—Support of Children

"The provisions in an original decree of divorce as to the care and maintenance of minor children are not res judicata of such matter on petition, filed over 11 years thereafter, and pertaining to care of child then 12 years of age who had had and still had various ailments.

"Support of Children—Reference to Friend of the Court—Statutes—Hearing

"A defendant in a suit for divorce is not deprived of a hearing before the trial court by reason of statutory reference of matter of care and maintenance of their minor child to the friend of the court, where court afforded defendant a full and fair hearing as to the action the trial court would take in considering the recommendations of the friend of the court and such testimony as the court might see fit to take (3 Comp. Laws 1929, S. 12783 et seq.).

"Judges—Friend of the Court—Bias

"Contention that circuit judge and friend of the court were disqualified by reason of personal bias and prejudice and because the friend of the court was financially interested in divorce proceedings since he received compensation for his services as a public officer held, without merit."

CONCLUSION

Finally, attention should be called to the methods and systems adopted by courts of record in large metropolitan areas of the use of an administrative department to aid and assist the court in disposing of many domestic relations problems in the administration of justice, which is somewhat detailed in (informal statement and brief of Friend of the Court, 5, 6 and 7).

It is submitted that the petition for allowance of appeal and for writ of certiorari should be denied.

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